FILED
SEP 27 1932
CHARLES ELMORE CROPLEY
CLERK

FILE COPY

No. 43

In the Supreme Court of the United States

OCTOBER TERM, 1932

WILLIAM GRAU, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

CITATIONS

Cases:	Page
Herter, In re, 33 F. (2d) 402	3
Hurley v. *United States*, 300 Fed. 75	3
Jozwich v. *United States*, 288 Fed. 831	4
Kasprowicz v. *United States*, 20 F. (2d) 506	3
Nobriga v. *United States*, 22 F. (2d) 507	3, 4
Staker v. *United States*, 5 F. (2d) 312	4
United States v. *A Certain Distillery*, 24 F. (2d) 557	4
United States v. *Backer*, 32 F. (2d) 936	3
United States v. *Berger*, 22 F. (2d) 867	3
United States v. *Deloie*, 2 F. (2d) 377	3
United States v. *Goodwin*, 1 F. (2d) 36	4
United States v. *Jajeswiec*, 285 Fed. 789	4
United States v. *Leach*, 24 F. (2d) 965	4
United States v. *Lepper*, 288 Fed. 136, affirmed without opinion *sub nom. Lepper* v. *United States*, 295 Fed. 1017	3
United States v. *Vottiero*, 25 F. (2d) 346	3
Statutes:	
Espionage Act, 40 Stat. 228, Sec. 2 (U. S. C., Title 18, Sec. 612)	5
National Prohibition Act, c. 85, Sec. 25, Title II, 41 Stat. 305, 315 (U. S. C., Title 27, Sec. 39)	1
New York Code of Criminal Procedure, Secs. 792, 797 (Cook's Criminal Code, 29th ed., 1917, pp. 466, 467)	5
Miscellaneous:	
House Report No. 69, 65th Cong., 1st Sess., p. 20	5
Cong. Rec., Vol. 55, p. 3439	5

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 43

WILLIAM GRAU, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Section 25, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 315 (U. S. C., Title 27, Sec. 39), provides that—

> No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose, such as a store, shop, saloon, restaurant, hotel, or boarding house.

It is not denied that the premises searched were occupied solely as a private dwelling. (R. 22–23, 24.) The affidavit [1] upon which the search warrant was based reads as follows (R. 14):

---

[1] Two affidavits were presented to the Commissioner who issued the warrant. One of them, that by Agent Sandlin, may be disregarded, as it refers to the affidavit of Agent

> Now comes F. M. Curtis, P. A. and makes oath and states that on or about October 14, 1931, he went around and about the premises hereinafter described and saw persons haul cans, commonly used in handling whiskey, and what appeared to be corn sugar up to and into the place, and saw the same car or truck haul similar cans, apparently heavily loaded away from there and smelled odors and fumes of cooking mash coming from the place, and he says there is a still and whiskey mash on the premises; said premises being known as No. 18 Loraine Court (Woodlawn), Newport, Campbell County, Ky.

One of the questions presented is whether this affidavit showed probable cause for believing that the premises were being used in the manner specified in Section 25.

In our brief in opposition to the petition for certiorari we doubted the sufficiency of the affidavit to show probable cause for belief that liquor was being sold upon the premises, but contended that if the premises were being used in conducting the business of selling liquor, it was immaterial whether sales were consummated on the premises or elsewhere. The court below having considered (R. 27) the affidavit adequate to establish probable cause for believing that the dwelling in question was being used as a "headquarters for the merchandising of liquor," we opposed the writ. We

---

Curtis for the facts supporting the charges that the premises were used for the unlawful possession, manufacture, and sale of intoxicating liquor.

are still of the opinion that a warrant may lawfully issue to search a dwelling house thus used. *Kasprowicz* v. *United States,* 20 F. (2d) 506 (C. C. A. 6th); *United States* v. *Berger,* 22 F. (2d) 867 (Mass.); *United States* v. *Vottiero,* 25 F. (2d) 346, 347 (S. D. N. Y.); *United States* v. *Backer,* 32 F. (2d) 936 (N. D. Cal.), but see cases cited *contra* (Pet's. Brief, pp. 34–37). The difficulty we experience is that upon further consideration we are unable to escape the conclusion that the allegations of the affidavit in question are not sufficiently comprehensive to support a showing that the premises were used in connection with the sale of liquor anywhere. *Nobriga* v. *United States,* 22 F. (2d) 507 (C. C. A. 1st); *United States* v. *Deloic,* 2 F. (2d) 377 (W. D. Wash.); *Cf. In re Herter,* 33 F. (2d) 402 (C. C. A. 9th); *Hurley* v. *United States,* 300 Fed. 75 (C. C. A. 1st); *United States* v. *Lepper,* 288 Fed. 136 (W. D. N. Y.), affirmed without opinion *sub. nom. Lepper* v. *United States,* 295 Fed. 1017 (C. C. A. 2d); *United States* v. *Backer,* 32 F. (2d) 936 (N. D. Cal.), *supra.* The agent was not unaware that the place to be searched was a private dwelling, and his affidavit should have set forth the evidence of commercialism in clear, precise, and unequivocal language. His affidavit shows only that cans were brought to a place where there was some reason to believe that liquor was being manufactured and that these cans were later taken away again in the car which brought them.

There was no evidence of sale on the premises or at any other place.

The affidavit did not show that the dwelling house was being used for any business purpose. For this purpose, it was not enough to show illegal manufacture. *Staker* v. *United States,* 5 F. (2d) 312 (C. C. A. 6th); *Jozwich* v. *United States,* 288 Fed. 831 (C. C. A. 7th); *United States* v. *Leach,* 24 F. (2d) 965 (Del.); *United States* v. *A Certain Distillery,* 24 F. (2d) 557 (E. D. La.); *United States* v. *Jajeswiec,* 285 Fed. 789 (Mass.). There was nothing to show continuity of operations or any other circumstances from which it could fairly be assumed that liquor was being manufactured for commercial purposes. See *Nobriga* v. *United States,* 22 F. (2d) 507 (C. C. A. 1st), *supra; United States* v. *Goodwin,* 1 F. (2d) 36 (S. D. Cal.).

In view of our conclusion it is unnecessary to discuss at length the other contention urged by petitioner, i. e., that the warrant was defective because it did not repeat the facts set forth in the affidavit. The analysis we have made of Section 6 of the Espionage Act and its related sections in the brief in opposition challenges this contention, which we believe to be without merit. (Br. pp. 5–10.) We are sustained in this position by the legislative history of those sections, which shows that they were intended to have the same effect as corresponding provisions of the New York Code of

Criminal Procedure. (See House Report No. 69, 65th Cong., 1st Sess., p. 20; Cong. Rec., Vol. 55, p. 3439.) Section 797 of the New York Code (Cook's Criminal Code, 29th ed., 1917, pt. 2, p. 467) prescribes a form of warrant which complies with the statute and which reads as follows:

> Proof by affidavit having been this day made before me, by [naming every person whose affidavit has been taken], that [stating the *particular grounds of the application, according to section seven hundred and ninety-two,* or if the affidavit be not "positive that there is probable cause for believing that," stating the ground of the application in the same manner]. (Italics ours.)

Section 792 of the Code (id., p. 466), to which the form makes reference, is substantially like Section 2 of the Espionage Act (40 Stat. 228; U. S. C., Title 18, Sec. 612) and states the particular grounds upon which a search warrant will issue, i. e., when the property was stolen or embezzled; when it was used as the means of committing a felony, etc. It is evident, therefore, that the warrant is not invalid merely because it states the grounds of the application, without reciting the facts disclosed by affidavit or oral testimony upon which the warrant issued.

CONCLUSION

We are constrained to conclude that the affidavit was insufficient to support the warrant but do not formally confess error, believing that where con-

viction for crime has been affirmed in a Circuit Court of Appeals the judgment of conviction should not be reversed except by this Court after examination of the record.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
PAUL D. MILLER,
JOHN J. BYRNE,
W. MARVIN SMITH,
Attorneys.

SEPTEMBER, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1932